

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Bair Hugger Forced Air Warming
Products Liability Litigation

MDL No. 2666
(JNE/FLN)

This Document Relates to All Actions

JOINT MOTION REGARDING
CONTINUED SEALING

Documents have been filed under temporary seal in connection with the following motion:

Defendants' Motion for Summary Judgment With Respect to General Causation (Doc. No. 759)

Pursuant to LR 5.6, the parties submit this Joint Motion Regarding Continued Sealing.

DKT. NO.	DESCRIPTION OF DOCUMENT	MARK "X" IN APPLICABLE COLUMN				NONPARTY THAT DESIGNATED DOC. CONFIDENTIAL (IF ANY)	REASON WHY DOCUMENT SHOULD REMAIN SEALED OR BE UNSEALED ⁱ
		Parties Agree Doc.	Parties Disagree	Parties Agree Doc. Should Be Unsealed	Parties Should Remain Sealed		
935	Plaintiffs' Response Opposing Defendants' Motion for Summary Judgment		X			Not Applicable.	<p>Plaintiffs' position. The Plaintiffs respectfully maintain there is a strong public interest afforded by both the First Amendment and common law in accessing court proceedings and records. See, e.g., <i>Ass. Press v. District Court</i>, 705 F.2d 1143, 1145 (9th Cir. 1983); <i>NBC Subsidiary (KNBC-TV), Inc., v. Superior Court</i>, 980 P.2d 337, 358 (Cal. 1999); <i>Mokhiber v. Davis</i>, 537 A.2d 1100, 1107 n.4 (D.C. 1988). As the party attempting to seek restrictions on public right of access to court proceedings, Defendants bear the burden of showing good cause support access restrictions. See <i>Parsy v. Borough of Stroudsburg</i>, 23 F.3d 772, 785-86 (3d Cir. 1994)(noting good cause requires showing disclosure will cause a clearly defined and serious injury, which must be demonstrated with specificity)(quotations omitted). One of the relevant factors in considering</p>

	<p>whether to deny public access is whether confidentiality is being sought over information important to public health and safety. See <i>Glenmede Trust Co., v. Thompson</i>, 56 F.3d 476, 483 (3d Cir. 1995).</p> <p>Defendants made no attempt to seal the proceedings, and have failed to demonstrate with specificity any clearly defined and serious injury that satisfies good cause requirement for sealing the Court proceedings and files. As the Defendants are aware, the press was present and taking notes throughout the duration of the three-day hearing.</p>	<p>Defendants' position. Plaintiffs' brief should be redacted in accordance with Defendants' requests to maintain sealing of exhibits, as set forth below. Specifically, those portions of the brief that quote or paraphrase Exhibits 2, 3, 17, 22, 24, 26, 34 and 35 should be redacted.</p>	<p>Plaintiffs' position. There is a strong public interest in disclosure of this document, which reflects [REDACTED]</p>
		X	Not Applicable.
937	Exhibit 2 to the Declaration of Genevieve M. Zimmerman in Support of Plaintiffs' Response Opposing Defendants' Motion for Summary Judgment ("Zimmerman Decl.") (3MBH00982867-85)		

	<p>[REDACTED]. The document was read aloud and displayed on multiple occasions during the three day hearing, in an open courtroom with the press and public in attendance. This document contains information significantly important to public health and safety, and plaintiffs respectfully submit it should be unsealed.</p> <p>Defendants' position. This draft protocol relates to a clinical trial that was never performed. Public disclosure is likely to cause competitive harm to 3M by revealing relationships with clinics and competitive positioning of pre-warming product.</p>	<p>Plaintiffs' position. The Plaintiffs respectfully submit the public interest in accessing this document is significant. The internal document contains a [REDACTED] Al Van Duren (who was also the 3M corporate designee for the 30(b)(6) deposition taken during this MDL.) [REDACTED]</p>
938	Exhibit 3 to the Zimmerman Decl. (3MBH00001389-90)	X Not Applicable.

[REDACTED] This admission is information very important to issues of public health and safety.

Defendants' position. This document should remain under seal. *The Court previously ordered that this document should remain under seal when it was filed at Doc. No. 347. (See Order, Doc. No. 854.)* This document is an internal draft of talking points for Arizant sales representatives from 2010. It was labeled "Confidential—Not for external distribution" at the time. It is not a final version whose content may have been publicly disclosed. Defendants designated this document as Confidential under PTO 7 because it contains strategic planning information of competitive significance.

948	Exhibit 17 to Zimmerman Decl. (30(b)(6) deposition of Albert Van Duren), redacted portions			Not Applicable.	
	Redactions on pp. 53-57	X		Not Applicable.	
	Redactions on pp. 59-61	X		Not Applicable.	
	Redactions on pp. 69-74	X		Not Applicable.	
	Redactions on pp. 80-84	X		Not Applicable.	
	Redactions on pp. 87-90	X		Not Applicable.	
	Redactions on pp. 93-94		X	Not Applicable.	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible. Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected.</p> <p>Defendants' position. Testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are</p>

			likely to cause competitive harm to 3M if publicly disclosed.
	Redactions on p. 96	X	Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible. Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected.
			Defendants' position. Testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.
		X	Not Applicable.
			Redactions on pp. 98-100

				publicly accessible. Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected.
				Defendants' position. Testimony concerns internal strategy to deal with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.
Redactions on pp. 255-56	X		Not Applicable.	
Redactions on pp. 275-77	X		Not Applicable.	
Redactions on p. 277-283	X		Not Applicable.	
Redactions on p. 309	X		Not Applicable.	Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible. Defendants' ongoing attempt to paint all safety questions and/or studies as nefarious and tainted by Augustine should be rejected.
				Defendants' position. Testimony concerns internal strategy to deal

				with customer perceptions influenced by Augustine campaign. These internal deliberations are likely to cause competitive harm to 3M if publicly disclosed.
		X	Not Applicable.	Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible.
	Redactions on pp. 318-322			Defendants' position. Testimony concerns design and development of next-generation Bair Hugger warming system that is not at issue in this case. Public disclosure is likely to cause competitive harm to 3M.
939	Exhibit 21 to the Zimmerman Decl. (3MBH01485746-47)	X	Not Applicable.	
940	Exhibit 22 to the Zimmerman Decl. (3MBH00556461-70)	X	Not Applicable.	Plaintiffs' position. The Plaintiffs respectfully submit the public interest in accessing this document is significant.

941	Exhibit 23 to the Zimmerman Decl. (3MBH00144055)	X	Not Applicable.	

943	Exhibit 24 to the Zimmerman Decl. (3MBH01260231-32)	<input checked="" type="checkbox"/>	Not Applicable.	<p>Plaintiffs' position. The internal email acknowledges [REDACTED]</p> <p>[REDACTED] These admissions are contrary to Defendants' public positions today, and is information very important issues of public health and safety.</p>	<p>Defendants' position. This document should remain under seal. This is an internal 3M communication between sales personnel concerning sales strategy relating to a specific customer. Disclosure of this internal sales strategizing is likely to cause competitive harm to 3M if publicly disclosed. Defendants designated the content of this document as Confidential under PTO 7 because it contains strategic planning information of competitive significance.</p>	
942	Exhibit 26 to the Zimmerman Decl. (3MBH01975262-65)		<input checked="" type="checkbox"/>	Not Applicable.		<p>Plaintiffs' position. Plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted</p>

	<p>from in open court, and should be publicly accessible. Because these documents address issues of health and public safety, Plaintiffs respectfully submit they should be unsealed.</p> <p>Defendants' position. This document should remain under seal. This is an internal 3M communication among sales personnel concerning discussions with the representatives of the government of South Korea concerning reimbursement for patient warming blankets. Disclosure of this internal sales strategizing is likely to cause competitive harm to 3M if publicly disclosed. Defendants designated the content of this document as Confidential under PTO 7 because it contains strategic planning information of competitive significance.</p>	<p>Plaintiffs' position. Same position as outlined above: plaintiffs respectfully submit the motion papers and supporting documents are a matter of significant public interest, were argued and quoted from in open court, and should be publicly accessible. [REDACTED]</p>
944	Exhibit 34 to the Zimmerman Decl. (3MBH01617179-81)	X Not Applicable.

[REDACTED]

Each of these touch on important issues of health and public safety, and Plaintiffs therefore respectfully submit this document should be unsealed.

Defendants' position. This document should remain under seal. *The Court previously ordered that this document should remain under seal when it was filed at Doc. No. 340. (See Order, Doc. No. 854.)* This document is an internal 3M document reflecting internal scientific and technical discussions. Defendants designated this document as Confidential under PTO 7 because it contains nonpublic technical and planning information of competitive significance to Defendants.

945	Exhibit 35 to the Zimmerman Decl. (3MBH00053467-72)		<input checked="" type="checkbox"/>	Not Applicable.	<p>Plaintiffs' position. Plaintiffs respectfully submit this document touches on knowledge of the inadequate state of study on Bair Hugger safety. Because this knowledge goes to issues of health and public safety, Plaintiffs respectfully submit it should be unsealed.</p> <p>Defendants' position. This document should remain under seal. <i>The Court previously ordered that this document should remain under seal when it was filed at Doc. No. 377. (See Order, Doc. No. 854.)</i> This document reflects notes of 3M employees from a strategic planning discussion. Defendants designated this document as Confidential under PTO 7 because it contains strategic planning information of competitive significance.</p>

Dated: November 7, 2017

Respectfully submitted,

S/ Benjamin W. Hulse

Jerry W. Blackwell (MN #186867)
Benjamin W. Hulse (MN #0390952)
Mary S. Young (MN #0392781)
BLACKWELL BURKE P.A.
431 South Seventh Street
Suite 2500
Minneapolis, MN 55415
Phone: (612) 343-3256
Fax: (612) 343-3205
Email: blackwell@blackwellburke.com
myoung@blackwellburke.com
bhulse@blackwellburke.com

S/ Genevieve M. Zimmerman

Michael V. Ciresi (MN #0016949)
Jan M. Conlin (MN #0192697)
CIRESI CONLIN LLP
225 S. 6th St., Suite 4600
Minneapolis, MN 55402
Phone: 612.361.8202
Email: MVC@CiresiConlin.com
JMC@CiresiConlin.com

S/ Bridget M. Ahmann (MN #016611X)

FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000
Email: bridget.ahmann@faegrebd.com

**Counsel for Defendants 3M Company and
Arizant Healthcare, Inc.**

Ben W. Gordon, Jr. (*Pro Hac Vice*)
LEVIN, PAPANTONIO, THOMAS, MITCHELL,
RAFFERTY & PROCTOR, P.A.
316 South Baylen Street, Suite 600
Pensacola, FL 32502-5996
Phone: (850) 435-7091
Fax: (850) 435-7020
Email: bgordon@levinlaw.com
Genevieve M. Zimmerman (MN #330292)
MESHBESHER & SPENCE, LTD.
1616 Park Avenue South
Minneapolis, MN 55404
Phone: (612) 339-9121
Fax: (612) 339-9188
Email: gzimmerman@meshbesh.com
Co-Lead Counsel for Plaintiffs

ⁱ This explanation should be very brief. For example:

1. contains information designated as confidential by a nonparty
2. contains information designated as confidential under a non-disclosure agreement between plaintiff and nonparty
3. contains information designated as confidential under a protective order issued in this case [MDL 2666 Docket No. 39]
4. discovery materials filed in connection with a motion under Fed R. Civ. P. 37
5. reveals trade secrets of defendant
6. reveals proprietary business methods of plaintiff
7. confidential financial records
8. confidential medical records
9. contains termination information regarding former employees of defendant
10. reveals information regarding a minor
11. contains information ordered sealed by the court on DATE [Docket No. XX]